IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 25TH OCTOBER 2007 / 3RD KARTHIKA 1929

CRL.A.No. 188 of 2003()

SC.538/1999 of ADDL.SESSIONS COURT (ADHOC-I), KASARAGOD

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APPELLANTS: ACCUSED

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1. CHANDRA SEKHARAN S/O. KANDAPPA,
   ANGUDIPADAVU, HOSANGADI

2. ASHOK KUMAR S/O. AITHAPPA BANGARA,
   SAIKRIPA, KANKANADI

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT AND STATE

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1. THE STATION HOUSE OFFICER, MANJESWAR.

2. STATE- REPRESENTED BY THE PUBLIC
   PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.P. NO. 1077 OF 2003 IN CRL. APPEAL NO. 188 OF 2003.

DISMISSED

25.10.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 188 OF 2003

Dated this the 25th day of October, 2007

JUDGMENT

This appeal is filed against the judgment in S.C. No.538 of 1999 on the file of the Additional Sessions Court (Ad hoc-I), Kasaragod. The appellants faced trial for the offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution case against the appellants - accused was that on 29.5.1999 at 4.30 a.m., both the accused were found transporting 432 quarter bottles of Indian made foreign liquor in nine hard board boxes in an autorickshaw bearing Registration No.KL 14A/5322 within the limits of Manjeswar Police Station, in contravention of the provisions of the Abkari Act. After having seized the contraband articles, the second accused was arrested and case was registered against both the accused. To prove the case against the appellants - accused, the prosecution examined PWs.1 to 4 and produced Exts.P1 to P6 as well as MOs.1 to 3. No oral or documentary evidence was adduced on the side of the defence. After

closing the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. They denied the incriminating circumstances proved against them by the prosecution. Relying on the prosecution evidence, the trial court found both the accused guilty under Section 55(a) of the Abkari Act, convicted them thereunder and sentenced them each to undergo rigorous imprisonment for three years and to pay a fine of of Rs.1,00,000/- each and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months each. The above conviction and sentence are challenged in this appeal.

3. This Court heard the learned counsel appearing for the appellants as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellants has raised the following contentions in challenging the judgment of the trial court: (i) the trial court committed serious error in finding the appellants guilty of the charge only on the evidence of the police officials as there was no independent witness to support the evidence of the police officials, (ii) the finding of the trial court that the appellants committed offence punishable under Section 55(a) of the Abkari Act is not tenable in the light of the principles laid down by this Court in the decisions reported in **Surendran**

v. Excise Inspector, 2004(1) K.L.T. 404 and Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631 as the prosecution had not proved that the possession of the contraband articles was in connection with export, import, transport or transit, (iii) as per the judgment reported in **Sabu v. State of Kerala, 2007(4) K.L.T. 169**, even if the evidence of the prosecution is accepted, the appellants can be convicted only under Section 63 of the Abkari Act for violation of Rule 11A of the Foreign Liquor Rules and (iv) the punishment awarded by the trial court is excessive.

5. The prosecution case was that the appellants were found transporting and in possession of 384 bottles each containing 180 ml. of A.J. Fenny and 48 bottles each containing 180 ml. of Original Choice Fine Whiskey. As per the evidence of PW.4, the Sub Inspector of Police, Manjeswar police Station, who detected the offence, the appellants were found transporting the above contraband articles without any permit in an autorickshaw bearing Registration No. KL 14A/5322. The evidence of this witness would show that he seized the contraband articles as per Ext.P1 seizure mahazar, took two samples from each of the items for chemical analysis and arrested the second accused at the spot. The first accused escaped from the place of occurrence. Ext.P6 chemical analysis

report shows that the two samples of A.J. Fenny contained 42.72 percent by volume of ethyl alcohol and the two samples of Original Choice Fine Whiskey contained 36.1 and 36.9 percent by volume of ethyl alcohol. The evidence of PW.4 would further show that the samples and the residue were produced before the court on 1.6.1999. It is seen from Ext.P4 property list that the committal court had verified the items and sent them back for local custody. PW.1 was the Head Constable who had accompanied PW.4. He corroborated the evidence of PW.4. The evidence of PW.4 supported by the evidence of PW.1 would show that the prosecution had succeeded in proving that the appellants - accused were found transporting 432 quarter bottles of Indian made foreign liquor without any authority under the provisions of the Abkari Act and the rules framed thereunder. Though the prosecution examined PWs.2 and 3 to support the evidence of PWs.1 and 4, they turned hostile to the prosecution. However, these witnesses admitted their signature in Ext.P1 seizure mahazar and other records prepared by PW4.

6. There is no legal bar in the prosecution proving its case on the evidence of the investigating officers or the official witnesses, if their evidence is otherwise free from doubt. In the above circumstances, the trial court was fully justified in accepting the evidence of PWs.1 and 4 to

find that the appellants were engaged in transporting Indian made foreign liquor seized as per Ext.P1 seizure mahazar.

7. The next question to be considered is whether the prosecution had succeeded in proving that possession of the contraband articles was in connection with export, import, transport or transit, in the light of the principles laid down by this Court in the decisions reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404 and Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631.** The evidence of PWs.1 and 4 would show that the second accused had told them that the Indian made foreign liquor found in their possession was from Karnataka. The labels on the bottles would also show that the contraband articles were from Karnataka. But, on that evidence alone, this Court is not in a position to hold that the prosecution had succeeded in proving that possession of the contraband articles was in connection with export, import, transport or transit. Hence, the finding of the trial court that the appellants - accused committed offence punishable under Section 55(a) of the Abkari Act is not legally justifiable. The conviction and sentence ordered against the appellants under Section 55(a) of the Abkari Act are, therefore, set aside.

8. The evidence of PWs.1 and 4 would prove that the appellants -

accused violated the provisions of the Abkari Act and the rules framed thereunder. In the judgment reported in **Sabu v. State of Kerala, 2007 (4)K.L.T. 169**, this Court held that the contraband articles seized from the accused being Indian made foreign liquor, the offence committed by the accused would come under the provisions of the Foreign Liquor Rules and not under the Abkari Act. This Court also held that violation of any rule framed under the provisions of the Abkari Act can be punished only under Section 63 of the Abkari Act. Applying the above principle and on accepting the evidence of PWs.1 and 4, this Court finds that the appellants committed offence punishable under Section 63 of the Abkari Act. The prosecution case itself was that both the accused were found transporting 432 quarter bottles of Indian made foreign liquor in an autorickshaw and thus they were in possession of the contraband articles. Rule 1A of the Foreign Liquor Rules defines foreign liquor as follows:

> "`Foreign Liquor' in these Rules means and includes all wines, spirits, beer, cider, fenny and other fermented liquors and plain rectified spirit including absolute alcohol intended to be used for the manufacture of liquors meant for human consumption into the State by sea or land or air, whether manufactured in India or outside."

Rule 9 of the Foreign Liquor Rules provides that "**no foreign liquor shall**

be imported into the State except under a permit issued by the officer-in-charge of the Division to which the liquor is to be imported". The above rule also provides that such permits will be granted only on proof of payment of the excise duty, if any, payable to the State. Rule 11 of the Foreign Liquor Rules provides that **"no quantity of foreign liquor in excess of the quantity notified by the Government under Sections 10 and 13 of the Abkari Act shall be transported from one place to another within the State unless the same is covered by a transport permit issued by the Excise Inspector in charge of the Range of origin"**. As per Rule 11A of the Foreign Liquor Rules, no quantity of foreign liquor in excess of the quantity notified by the Government under Sections 10 and 13 of the Abkari Act shall be possessed or stored by any person within the State unless the same is covered by a permit issued by the Officer in charge of the Division concerned.

9. A reading of the above provisions would show that the appellants have violated the above rules and thereby committed offence punishable under Section 63 of the Abkari Act. Accordingly, accepting the evidence adduced by the prosecution, the appellants -accused are found guilty under Rule 11 of the Foreign Liquor Rules read with Section 63 of the Abkari Act for transporting 432 quarter bottles of Indian made foreign liquor

without any permit issued by the authorised officer, they are convicted thereunder and sentenced to undergo rigorous imprisonment for one month each and to pay a fine of Rs.5000/- each and in default of payment of fine, to undergo simple imprisonment for a further period of three months each. The appellants are also entitled to the benefit under Section 428 Cr.P.C. It is reported that the second appellant is no more. This fact shall be verified by the trial court while implementing the judgment.

The Crl. Appeal is allowed in part. The bail bonds executed by the appellants shall stand cancelled.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NO.188/2003

JUDGMENT

25th OCTOBER, 2007